

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FIVE

UNITY UNITED METHODIST CHURCH d/b/a
UMOJA HEAD START ACADEMY ¹
Employer

and

Case 5-RC-15496

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 500, AFL-CIO, CLC
Petitioner

DECISION AND DIRECTION OF ELECTION

The issues in this proceeding are: (1) whether the Employer's Head Start teachers are supervisors and/or professionals within the meaning of the Act; (2) whether Valencia Jones Brown is a confidential employee; and (3) whether Doris Johnson is a temporary employee who should be excluded from the petitioned-for unit.

The Employer operates a Head Start Academy at its 150 Harlem Avenue and 1114 North Mount Street, Baltimore, Maryland locations. The Petitioner seeks to represent all full-time and regular part-time Head Start teachers, assistant teachers, family service coordinators, and custodians, excluding all directors, family service coordinator supervisors, managers, confidential employees, guards, and supervisors as defined by the Act.²

The Petitioner maintains that teachers are not professionals and/or supervisors within the meaning of the Act. The Petitioner also argues that Valencia Brown and Doris Johnson should not be excluded from the unit because the record evidence does not support a finding that Brown is a confidential employee, and that Johnson is a temporary employee not eligible to vote.

The Employer contends that teachers are supervisors and professionals within the meaning of the Act, and that Valencia Brown and Doris Johnson should be excluded from the unit on the basis that Brown is a confidential employee and Johnson is a temporary employee.

¹ The name of the Employer appears as amended at the hearing. No issue was raised concerning the Board's exercise of jurisdiction over the Employer.

² The petitioned-for unit consists of 12 Teachers, 15 Assistant Teachers, 6 Facility Coordinators, and 1 Custodian.

The Employer presented the only witnesses at the hearing, Education Coordinator Daphne Hall, and Chairperson of the Board of Directors Kwame Abayomi.

Hall supervises the entire educational staff, including teachers and assistant teachers, and she also oversees all of the educational functions of the Academy. Hall testified that she observes classrooms during the day, monitors lesson plans, and reviews them in light of Head Start and childcare regulations. Hall stated that she was part of the Employer's management team, along with Director Stevenson and Administrative Assistant Nolan.

Hall's employment with the Employer began two weeks before the hearing in this case. Her testimony is based on training she received regarding the Employer's procedures. Hall testified generally that teachers evaluate assistant teachers and have input into their hiring, termination, transfer, and discipline. As to evaluations, Hall testified that teachers give input regarding assistant teachers' performance, attitude, and follow-through on job assignments. Hall stated she is to sit with teachers and ask them questions about the assistant teachers' attendance and interaction with the students and their families. It is based on this information that Hall is to fill out the performance evaluation forms. Hall could not tell what happens to the performance evaluation forms after they are filled out, or who else must review them.

As to hiring, Hall testified that she and the Director are in charge of hiring. Hall admitted that she has not participated in the hiring of anyone, and did not have any personal knowledge as to what, if any, input teachers had in that process. As to firing, she testified that recommendations can be made by the Director but ultimately are decided by the Employer's Board of Directors. Hall had no knowledge of any teachers participating in the decision to terminate an employee, nor did she know whether any independent investigation would be conducted prior to the Director making a recommendation to the Board of Directors.

Hall stated that the primary duty of teachers is running their classrooms, including developing lesson plans and directing assistant teachers in accordance with lesson plans. The teachers' lesson plans, which are devised several weeks to a month in advance, include a materials list (items such as books, paper, pencils, pictures, and blocks) associated with each plan. The assistant teachers are responsible for locating those materials for use on the appropriate day, including procuring the materials through the Employer's administration as necessary. At times, an assistant teacher will, in accordance with a lesson plan, read books to children.

Hall testified that there are subclassifications of Teachers employed at the Academy, based on their level of education. According to Hall, a Teacher 1 needs a childhood development associate certificate or a CDA³ and a willingness to continue training and education. A Teacher 3 position requires an AA degree in early childhood education plus 30 additional undergraduate credits with a concentration in early

³ A CDA is a 45 hour certificate.

childhood education. A Teacher 4 position requires a bachelor's degree in elementary education, social work, psychology or related human services field. The Teacher 4 must also pursue a CDA and obtain a bachelor's or master's degree or state certification in early childhood education within 3 years of hire. A Teacher 5 position requires a bachelor's degree in elementary education, social work, psychology or special education, and a CDA certificate. The Employer has one Teacher 5, five Teacher 4's, five Teacher 3's, and one Teacher 1.⁴

Regardless of classification, however, all teachers' duties are identical; the only differentiation among the various job classification levels is that each has a different pay scale. In order to be eligible for employment as a teacher, the Employer currently requires applicants to meet only the requirements for a Teacher 1 classification.⁵

Chairperson of the Board of Directors Abayomi testified that the Board of Directors designs and monitors policies and procedures for the Academy. In so doing, the Board of Directors does not get involved in day-to-day operations, but will follow up on outside inquiries. Although, the Board has the authority to hire and fire personnel, it typically does not directly handle this, but leaves the actual act to the management of the facility. In addition, the Board of Directors leaves to the Director of the facility the responsibility to follow internal procedures related to promotions and terminations.

ANALYSIS

Supervisors

Section 2(11) of the Act, 29 U.S.C. Section 152, provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. Mississippi Power Co., 328 NLRB 965, 969 (1999), citing Ohio Power v. NLRB, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in

⁴ Hall did not describe the educational prerequisites for a Teacher 2 classification.

⁵ The Employer plans, effective at an unknown future date, to raise the minimum qualifications for a teacher to that of a Teacher 2.

Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. Hydro Conduit Corp., 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status. Chicago Metallic Corp., 273 NLRB 1677 (1985). As pointed-out in Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in Hydro Conduit Corp.: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." See also Quadrex Environmental Co., 308 NLRB 101, 102 (1992). In this regard, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. Bowne of Houston, 280 NLRB 1222, 1224 (1986).

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. Kentucky River Community Care, Inc., 121 S. Ct. 1861, 1867 (2001). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. New Fern Restorium Co., 175 NLRB 871 (1969).

I find that the Employer has not met its burden of establishing that its teachers are supervisors. The Employer introduced the job description of a teacher at the hearing. The description provides that teachers' duties include, but are not limited to, supervising, evaluating, and training assistant teachers. However, the Employer provided no record testimony to explain or otherwise support this conclusory statement that teachers "supervise" the assistant teachers. Therefore, based simply on the job description, without evidence that these duties were in fact exercised with independent judgment, I cannot find the Employer carried its burden to establish supervisory authority. See Kentucky River Community Care; Sears, Roebuck & Co., 304 NLRB 193 (1991); Chevron, U.S.A., Inc., 309 NLRB 59, 69 (1992). Further, the record evidence establishes that any direction provided by teachers to assistant teachers is routine. The record is devoid of any evidence that teachers hire, fire, discipline or promote assistant teachers, or effectively recommend any of these actions. As for evaluating employees, Hall testified that as Education Coordinator she has the responsibility of meeting with teachers to review the performance of the assistant teachers. There is no evidence as to what happens to the appraisals after they are completed. Further, there is no evidence as to what effect, if any, the teacher's input has on an assistant teacher's appraisal. Significantly, the record does not establish whether the evaluations have any direct effect on employees' wages or retention. Therefore, the evidence fails to establish that the teachers' input in evaluations constitutes effective recommendations or that such recommendations require the exercise of any supervisory indicia. Children's Farm Home, 324 NLRB 61 (1997). Based on the foregoing, I find that the Employer, as the party asserting supervisory status, has not met its burden proving that teachers have the authority to hire, fire, discipline, evaluate, assign or responsibly direct other employees,

or carry out any of the functions set forth in Section 2(11) of the Act, or to effectively recommend such functions and utilize independent judgment in the execution of such functions. Kentucky River Community Care, 121 S.Ct. at 1867. Therefore, I find that the Employer's teachers are not supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will include the teachers in the unit.

Professional Employees

When Congress enacted Section 2(11) defining supervisors it also enacted Section 2(12), extending the protection of the Act to "professional" employees. Professional employees are those who:

engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process. . . .

In enacting this Section, the Senate report stressed that "the committee was careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and nurses." Leg. Hist. at 425.

Under Section 2(12) of the Act, in order to qualify as a professional, an employee must perform work of a predominantly intellectual and varied character, involving the consistent exercise of discretion and judgment, and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital. Avco Corp., 313 NLRB 1357 (1994). Although educational background does not control, the Board examines educational background for the purpose of deciding whether the work of the group satisfies the "knowledge of an advanced type" requirement.

Based on the foregoing and the record as a whole, I find that the Employer's teachers are not professionals as the term is defined in the Act. The evidence is insufficient to support a finding that they perform work that involves the consistent exercise of discretion and judgment in its performance. Similarly, the record does not establish that the work is predominantly intellectual in character. Record evidence shows that the minimum qualifications for a position as a teacher is a Child Development Associate Credential or a certification, a requirement less substantial than an A. A. degree (which generally requires only 2 years of college). Although there are teachers with

higher credentials, the Employer does not require the higher education for employment. In fact, the record established that the Employer's lowest-level teacher (Teacher 1) performs the same duties as a higher educated Teacher 5. Based on these facts and circumstances, I find that the Employer's teachers are not "professionals" within the meaning of the Act.

Confidential Employee

Confidential employees are those who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies concerning labor relations, or who regularly substitute for employees having such duties. As a policy matter, the Board excludes such employees from bargaining units. Ladish Co., 178 NLRB 90 (1969); B. F. Goodrich Co., 115 NLRB 722, 724 (1956); Ford Motor Co., 66 NLRB 1317 (1946). The Supreme Court explicitly approved the Board's definition of confidential employees in NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981).

The Board applies a "labor nexus" test in determining if an employee is a confidential. First, the Board looks to whether the employee in question acts in a confidential capacity, and second, whether the specific individuals for whom the employee works are managerial personnel responsible for labor relations policy. The test requires that "a confidential employee [have] a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it." Intermountain Rural Electric Assoc., 227 NLRB 1, 4 (1985). The Board narrowly construes this category, Dun & Bradstreet, Inc., 240 NLRB 162 (1979), and the Supreme Court in Hendricks County Rural Electric sanctioned this approach.

Mere handling of or access to confidential business or labor relations information, including personnel and financial records, is insufficient by itself to render an employee "confidential." Ernst & Ernst National Warehouse, 228 NLRB 590 (1977); Union Oil Co. of California v. NLRB, 607 F.2d 852 (9th Cir. 1979)(computer operators having access to personnel and statistical information upon which labor relations policy is based not confidential employees). An employee's access to personnel records and the fact the employee can bring information to the attention of management that may ultimately lead to disciplinary action by management is not enough to qualify an employee as confidential. RCA Communications, Inc., 154 NLRB 34, 37 (1965). On the other hand, secretaries who assist in the preparation of labor relations information, such as the employer's data in preparation for contract negotiations and minutes of negotiating sessions, were found to be confidential. Firestone Synthetic Latex Co., 210 NLRB 347 (1973).

The Employer contended at the outset of the hearing that clerical employee Valencia Brown should be excluded from the unit as a confidential employee, because she "has direct information and access to confidential employer-related records, personnel and fiscal and financial." No evidence whatsoever was introduced, however,

in support of the Employer's claim. Applying the forgoing test for confidential status, I find that the Employer has failed to establish through record evidence that Valencia Brown assists and/or acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. I further find the Employer has failed to show that Brown has access to confidential information directly related to the formation of the Employer's labor relations policies. Based on the foregoing, I conclude that Valencia Brown is not a confidential employee and should be included in the unit and eligible to vote in the election.

Temporary Employee

The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain future. Thus, if the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. Personal Products Corp., 114 NLRB 959 (1955); Lloyd A. Fry Roofing Co., 121 NLRB 1433 (1958); United States Aluminum Corp., 305 NLRB 719 (1991). In the instant case, the sole evidence introduced in the record by the Employer to establish that assistant teacher Doris Johnson is a temporary employee is a memorandum dated August 30, 2002, from Stevenson K. Johnson indicating she was being reclassified to temporary full-time status because she failed to get her GED. The memorandum informed Johnson that she would be considered a temporary full-time employee until she obtained her GED and a satisfactory performance review.

Based on the foregoing, the only record evidence concerning Johnson, I find insufficient evidence exists to support a conclusion that Johnson is a temporary employee under the Board's definition cited above. To the contrary, I find that Johnson's employment is uninterrupted and not subject to end at any date certain. Accordingly, I find that Doris Johnson should be included in the unit and eligible to vote in the election.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accord with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner, Service Employees International Union Local 500, AFL-CIO, CLC, a labor organization as defined in Section 2(5) of the Act, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The parties stipulated that Unity United Methodist Church d/b/a Umoja Head Start Academy, is a not-for-profit corporation engaged in the business of providing child and family educational services at its 150 Harlem Avenue and 1114 North Mount Street, Baltimore, Maryland locations. During the past 12 months, a representative period, the Employer derived gross revenues in excess of \$250,000 and during the same period purchased and received products, goods, and materials valued in excess of \$5,000 directly from points located outside the State of Maryland.

6. The parties stipulated that the following employees are supervisors within the meaning of Section 2(11) of the Act and are excluded from the unit: T. Ashallah Stevenson and Daphne Hall.

7. The parties stipulated that Lillian Nolan is a confidential employee and is excluded from the unit.

8. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, including Head Start teachers, assistant teachers, family service coordinators, custodians, and clerical employees employed by the Employer at its Baltimore, Maryland locations, excluding all directors, family service coordinator supervisors, managers, confidential employees, guards, and supervisors defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 500, AFL-CIO, CLC**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as

strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, Baltimore, MD 21202, on or before **DECEMBER 19, 2002**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to

the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **DECEMBER 26, 2002**. The request may not be filed by facsimile.

(SEAL)

/s/Wayne R. Gold

Dated: DECEMBER 12, 2002

Wayne R. Gold, Regional Director
National Labor Relations Board
Region 5

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